Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY,
Appellant,
v.
STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment (Rescript) of the Supreme Judicial Court for the Commonwealth of Massachusetts entered July 27, 1967 and from a Final Decree after Rescript of the Supreme Judicial Court entered August 9, 1967, pursuant thereto. The appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1967 Mass. Adv. Sh. 1301. It is set forth at pages 25 to 53 in the Appendix to this Statement.

Jurisdiction.

The proceeding before a Single Justice of the Supreme Judicial Court which gives rise to this appeal was brought by a bill for declaratory relief pursuant to chapter 30A and chapter 231A of the General Laws of the Commonwealth of Massachusetts. The bill prayed *inter alia* that the court make a binding declaration that sales to the appellant, a national banking association, were exempt from both the Massachusetts Sales and Use Taxes (St. 1966, c. 14, § 1 and § 2) because the Commonwealth of Massachusetts is prohibited from taxing such sales and uses under the Constitution or laws of the United States. The bill also prayed for a binding declaration that Emergency Regulation No. 6 (issued by the appellee, the State Tax Commission), which ruled that the sale, lease or rental of tangible personal property to national banks is subject to the Massachusetts Sales and Use Taxes, is invalid for the same reason.

The Single Justice reserved and reported without decision the case to the full court of the Supreme Judicial Court. On July 27, 1967, the full court entered a judgment (Rescript) which concluded that the taxes imposed by St. 1966, c. 14, § 1 and § 2, as applied to the appellant, a national banking association, are not repugnant to the Constitution and laws of the United States, and decreed that Emergency Regulation No. 6 is valid insofar as it rules that purchases of tangible personal property by national

banks are subject to the Massachusetts Sales and Use Taxes. A Final Decree pursuant to the Rescript was entered on August 9, 1967. Notice of Appeal was filed on October 13, 1967.

This appeal is taken from the judgment of the Supreme Judicial Court and from the Final Decree entered pursuant thereto.[1]

The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U.S.C. § 1257(2).

The cases believed to sustain the jurisdiction of this Court, in the order cited, are *Colorado Nat'l Bank of Denver* v. *Bedford,* 310 U.S. 41; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282; *Lake Erie & Western R.R. Co.* v. *State Public Utilities Commission of Illinois ex rel. Cameron,* 249 U.S. 422; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Public Utilities Commission of California,* 346 U.S. 346; *Kern-Limerick, Inc.,* v. *Scurlock,* 347 U.S. 110; *United States* v. *County of Allegheny,* 322 U.S. 174; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69; *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435.

Statutes Involved.

The Massachusetts statute involved is St. 1966, c. 14, § 1 and § 2, as amended by St. 1966, c. 483 (App. 53). Also involved is Emergency Regulation No. 6 (App. 71). The federal statute involved is 12 U.S.C. § 548 (App. 72).

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[1] The Supreme Judicial Court is not a court of record, the record in this case being in the Superior Court. Although the judgment of the Supreme Judicial Court is final for purposes of appeal to this Court (*Cole* v. *Violette,* 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript of the Supreme Judicial Court, and, to avoid any question, this appeal is taken from both.

Questions Presented.

The ultimate question presented is whether the Massachusetts Sales and Use Tax statute, St. 1966, c. 14, § 1 and § 2 (and similarly Emergency Regulation No. 6), is invalid when applied to purchases by the appellant, a national banking association, because the application of these Massachusetts statutory provisions (and this Regulation) to such sales and uses is repugnant to the Constitution and laws of the United States.

This ultimate question involves, among others, the following subsidiary questions:

1. Does 12 U.S.C. § 548, prohibit the application of St. 1966, c. 14, § 1 (Sales Tax statute), and St. 1966, c. 14, § 2 (Use Tax statute), to purchases by a national banking association?

2. Does the Constitution of the United States prohibit the application of St. 1966, c. 14, § 1 (Sales Tax statute), and St. 1966, c. 14, § 2 (Use Tax statute), to purchases by a national banking association because such a national banking association is an instrumentality of the United States immune from all state taxation except such as has been specifically permitted by the Congress?

3. For the purpose of determining whether the application of St. 1966, c. 14, § 1 (Sales Tax statute), and of Emergency Regulation No. 6 to purchases by a national banking association is repugnant to the Constitution or laws of the United States, is the legal incidence of the sales tax imposed by St. 1966, c. 14, § 1, on a national banking association as a purchaser?

Statement of the Case.

1. *Material Facts.* The appellant, First Agricultural National Bank of Berkshire County, is a national banking

association organized under 12 U.S.C. § 21 *et seq.*, with its principal place of business in Pittsfield, County of Berkshire, Massachusetts. It is one of ninety national banking associations within the Commonwealth of Massachusetts. The appellee is the State Tax Commission of the Commonwealth of Massachusetts.

Since April 1, 1966, the appellant has paid Massachusetts Sales and Use Taxes on purchases for its own use of tangible personal property.

On March 28, 1966, the appellant, by its counsel, requested a ruling or emergency regulation that national banks are exempt from Massachusetts Sales and Use Taxes. No ruling was received by the appellant or its counsel pursuant to such request. On May 31, 1966, however, the State Tax Commission issued Emergency Regulation No. 6, which ruled that "The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax."

2. *Proceedings Below and Federal Questions Presented.* A bill for declaratory relief under chapter 30A, § 7, and chapter 231A of the General Laws was filed on August 2, 1966, with the Justice of the Supreme Judicial Court sitting within and for the County of Suffolk. This bill was filed by the appellant against the State Tax Commission. In substance the bill sought a declaration that the recently enacted Massachusetts Sales and Use Taxes could not be applied to purchases made by a national banking association.

More particularly, the appellant prayed *inter alia* for a binding declaration under chapter 231A of the General Laws that sales to the appellant are exempt from the tax imposed by St. 1966, c. 14, § 1, because the Commonwealth of Massachusetts is prohibited from taxing such sales under the Constitution or laws of the United States. The bill also sought a binding declaration under chapter 231A

of the General Laws that the storage, use or other consumption of tangible personal property by the appellant is exempt from the tax imposed by St. 1966, c. 14, § 2, because the Commonwealth of Massachusetts is prohibited from taxing such storage, use or other consumption under the Constitution or laws of the United States. In addition, the bill sought judicial review of Emergency Regulation No. 6 issued by the State Tax Commission.

The appellee filed an answer which admitted all the allegations of fact pleaded in the appellant's bill. The bill and the answer raised the federal questions which are the subject matter of this appeal. The parties agreed to a statement of all the material facts constituting a case stated.

On August 24, 1966, by order of Paul C. Reardon, Justice of the Supreme Judicial Court, this case, at the request of counsel for both parties, was reserved and reported without decision to the full court of the Supreme Judicial Court for its determination and judgment or order, upon, among other things, the bill, the answer and the agreed statement of facts constituting a case stated.

The full court of the Supreme Judicial Court entered a Rescript on July 27, 1967, which, among other things, ordered that a Final Decree be entered in accordance with the court's opinion. The opinion passed on all the federal questions raised on this appeal (see pages 25 to 53 hereof). Thus it was stated in the opinion:

(1) "For these reasons [reasons given in the opinion] the application of the use tax to purchases made by the plaintiff [the appellant] does not violate any law of the United States"[2] (App. 52).

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[2] Since the court concluded that the legal incidence of the Sales Tax is upon the vendor, the court confined its discussion of whether the Massachusetts statute was repugnant to the Constitution and laws of the United States to those portions of the statute which related to the Massachusetts Use Tax.

(2) "We find nothing in the Constitution of the United States or the recent Supreme Court decisions interpreting it to prevent the application of the use tax to purchases made by the plaintiff [the appellant] and other national banks doing business in the Commonwealth"[2] (App. 48).

(3) "We conclude that the incidence of the sales tax is upon the vendor" (App. 35).

In accordance with the Rescript and the opinion of the full bench, a Final Decree was entered on August 9, 1967, which ordered, adjudged and decreed that "Emergency Regulation No. 6, of the State Tax Commission is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes, St. 1966, c. 14, secs. 1 and 2" (App. 75).

The Questions are Substantial.

1. *The Questions are Properly Before the Court on Appeal.*

This is an appeal pursuant to 28 U.S.C. § 1257(2), where the validity of applying Massachusetts St. 1966, c. 14, § 1 (Sales Tax statute), and St. 1966, c. 14, § 2 (Use Tax statute), to purchases by national banking associations is drawn in question on the ground that each of these statutes is repugnant to the Constitution of the United States and 12 U.S.C. § 548.

The Supreme Judicial Court for the Commonwealth of Massachusetts, the highest state court in the Commonwealth, held that the application of the Massachusetts Use Tax to purchases by a national bank did not violate any law of the United States, expressly including 12 U.S.C. § 548. This Court, therefore, has jurisdiction under 28 U.S.C. § 1257(2). *Colorado National Bank* v. *Bedford,* 310 U.S. 41, 47. The Supreme Judicial Court also held that there

was nothing in the Constitution of the United States to prevent the application of the Use Tax to purchases by national banking associations. The court therefore upheld the validity of the Massachusetts Use Tax statute as applied to purchases by national banking associations as not being repugnant to the Constitution of the United States. For this reason the court also has jurisdiction under 28 U.S.C. § 1257(2).

It is, of course, clearly established that the "validity" of a state statute is also said to have been sustained within the meaning of 12 U.S.C. § 1257(2), when the state court holds the statute applicable to a particular set of facts (as is true in the instant case) and the contention is made that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282.

In addition, the Supreme Judicial Court ordered that "A final decree is to be entered declaring that emergency regulation No. 6 is valid insofar as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes" (App. 52). The decision upholding the validity of this regulation also confers jurisdiction on this Court under § 1257(2). The reference in this section to "statute of any state" has been repeatedly defined to encompass orders of state commissions and governing bodies issued in the exercise of their delegated legislative authority. *Lake Erie & Western Railroad Co.* v. *State Public Utilities Commission of Illinois ex rel. Cameron,* 249 U.S. 422. *Atchison, Topeka & Santa Fe Railway Co.* v. *Public Utilities Commission of California,* 346 U.S. 346, 348-349.

The question of whether the Massachusetts Sales Tax statute can be validly applied to purchases by a national banking association involves the further subsidiary question of whether the legal incidence of the sales tax is on

the seller or the purchaser.[3] The Supreme Judicial Court held that the incidence of said tax was on the seller. This subsidiary question is also a federal question where federal rights are involved; and, as such, it is ripe for redetermination by this Court.

In *Kern-Limerick, Inc.*, v. *Scurlock;* 347 U.S. 110, this Court held, contrary to the decision of the Supreme Court of Arkansas, that the United States government, rather than certain private contractors, was the purchaser; and hence it was unconstitutional to apply the Arkansas Gross Receipt Tax Law to the transaction therein involved. The court was of the view that ". . . the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest" (p. 121). To the identical effect is *United States* v. *County of Allegheny,* 322 U.S. 174, 184.

Even in a situation where this Court is of the opinion that a state court's interpretation of a taxing statute is binding as a matter of state law, that construction is not determinative of whether the tax deprives the taxpayer of a federal right. "That issue turns not on the characterization which the state has given the tax, but on its operation and effect." *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 84. To the same effect is *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 443:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."

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[3] The court concluded that, "In contrast to the sales tax, there is no doubt that the incidence of the use tax is upon the purchaser" (App. 35).

Since the rights of the appellant under 12 U.S.C. § 548, and under the Constitution of the United States rest upon the characterization of the Massachusetts Sales Tax as a vendor or a vendee tax, the Supreme Judicial Court's characterization of that tax as a vendor tax is not binding on this Court for the purpose of determining whether the appellant's federal rights have been violated.

2. The Questions are Substantial and Important.

A. *The Decision Below is in Direct Conflict with the Decisions of This Court.*

Under 12 U.S.C. § 548, Congress has authorized state taxation of national banks only by one of four specified methods (in addition to taxes on their real estate). Neither the Massachusetts Sales Tax nor the Massachusetts Use Tax is one of the four methods of state taxation permitted by 12 U.S.C. § 548. The Massachusetts Sales and Use Taxes are not taxes levied on shares (or dividends therefrom) of a national bank; nor are they taxes on the net income (or according to the net income) of such a bank. Inasmuch as national banks, by reason of the provisions of 12 U.S.C. § 548, may not be taxed except as specifically provided thereunder, the Sales and Use Taxes enacted by the Commonwealth of Massachusetts are prohibited by 12 U.S.C. § 548, and are unconstitutional as applied to purchases by a national bank.

The decision below, however, held that a state can tax a national bank notwithstanding the absence of permissive legislation by Congress. This is in direct conflict with the decisions of this Court. National banks are instrumentalities of the Federal Government, created for a public purpose, and as such are necessarily subject to the paramount authority of the United States. This Court has repeatedly and consistently held that the respective states are wholly without power to levy any tax, either direct or

indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress. *Owensboro National Bank* v. *Owensboro,* 173 U.S. 664, 668. *First National Bank of Guthrie Center* v. *Anderson,* 269 U.S. 341, 347. *First National Bank of Hartford, Wisconsin,* v. *Hartford,* 273 U.S. 548, 550. *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239. *Colorado National Bank of Denver* v. *Bedford,* 310 U.S. 41.

In *Michigan National Bank* v. *Michigan,* 365 U.S. 467, 472, the majority opinion noted that this Court had passed on 12 U.S.C. § 548, and its predecessors, over fifty-five times in the near century of the section's existence. Both the opinion of this Court and the dissent by Whittaker, J., joined by Douglas, J., confirm that the sole authorization under which a state is permitted to tax a national bank is 12 U.S.C. § 548.

It is inconceivable that there could be any doubt concerning this matter. As recently as December 12, 1966, this Court said, in a unanimous decision, that the tax-immunity of national banks as instrumentalities of the United States "is beyond dispute." *Department of Employment* v. *United States,* 385 U.S. 355. This Court held that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation on its operations, and that this immunity had not been waived by congressional enactment. In so holding, this Court noted in an opinion by Justice Fortas, at page 360:

> "In those respects in which the Red Cross differs from the usual government agency—*e.g.,* in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.*" (Emphasis supplied.)

Despite a century of decisions by this Court which have clearly, unequivocally and unremittingly established (without even the slightest intimation otherwise) that states can directly or indirectly tax national banks only as Congress permits, the Supreme Judicial Court in the decision below has expressly and squarely held to the contrary.

B. *The Decision Below is in Direct Conflict with the Decisions of Other State Courts.*

Congress established a nationwide system of banks in the promotion of the legitimate ends of the Federal Government. At the same time it chose to permit a separate system of banks governed by state law. To protect the very basis of this dual banking system, however, Congress carefully defined the manner and the extent to which states are permitted to tax national banks. It is well established and (until the decision below) uncontroverted that the exclusive source of authority for the state taxation of these instrumentalities is in 12 U.S.C. § 548, and this has been so recognized by numerous state court decisions. *First National Bank of Birmingham* v. *State,* 262 Ala. 155, 77 S. 2d 653. *O'Neil* v. *Valley National Bank of Phoenix,* 58 Ariz. 539, 121 P. 2d 646. *First National Bank & Trust Co.* v. *West Haven,* 135 Conn. 191, 62 A. 2d 671. *People ex rel. Hanover Bank* v. *Goldfogle,* 234 N.Y. 345, 137 N.E. 611. *First National Bank of Portland* v. *Marion County;* 169 Ore. 595, 130 P. 2d 9. *Northwestern National Bank of Sioux Falls* v. Gillis,—S.D.—, 148 N.W. 2d 293. *Austin* v. *Seattle,* 176 Wash. 654, 30 P. 2d 646. For example, in the *West Haven* case it was held at page 192:

> "National banks are agencies of the United States, created under its laws to promote its fiscal policies, and the banks, their property and their shares, cannot be taxed under state authority except as Congress con-

> sents, and then only in conformity with restrictions attached to its consent."

There are no other state court decisions which hold or even suggest the contrary. Until the decision below, this was also the well-established rule in the Commonwealth of Massachusetts. Thus in *Commissioner of Corporations & Taxation* v. *Woburn National Bank*, 315 Mass. 505, 506, the Supreme Judicial Court could not have been any clearer when it said:

> "Without Congressional permission a State has no right to impose a tax directly upon an instrumentality or agency of the United States such as a national bank."

Notwithstanding the overwhelming and undisputed decisions of the state courts, the opinion below, with a complete disregard for the foregoing authorities, has rejected what is a firmly settled and (until the decision below) unquestioned rule of law.

C. *The Decision Below has Interpreted 12 U.S.C. § 548, Contrary to the Intent of Congress and Decisional Law.*

While the opinion below recognized that 12 U.S.C. § 548, has been interpreted to set forth the outer bounds to which Congress has permitted state taxation of national banks (App. 49), the Court below nevertheless concluded that this section did not prohibit the application of the Massachusetts Use Tax to purchases by the appellant. The Supreme Judicial Court took the position that the principle that § 548 stands as the outer limit of state power to tax national banks necessarily depends on the underlying premise that, absent such a statute, the Constitution of the

United States would prohibit a tax levied on a national bank. "Only if that preliminary conclusion is made can § 548, which only purports to regulate taxation of national bank shares, be interpreted to forbid the States from imposing other taxes on national banks" (App. 50). These two premises (both of which are necessary in order to reach the conclusion of the court below)—*i.e.*, that the Constitution of the United States does not prohibit the imposition of a nondiscriminatory state tax on a national bank and that 12 U.S.C. § 548, only purports to regulate the taxation of national bank shares and does not prohibit other methods of state taxation—are not correct.

As to the first of these two premises, the Supreme Judicial Court was of the view that national banks had lost their constitutional immunity from state taxation because a metamorphosis had taken place in the nature and functions of national banks. The decision below relied on the fact that the Federal Reserve Act of 1913 (Act of December 23, 1913, c. 6, 38 Stat. 251) reduced the role of national banks as fiscal agents of the United States and that the power of national banks to engage in general banking had been broadened.

But the decision below ignores the fact that national banks still retain their character as federal instrumentalities. National banks are creatures of the Federal Government and owe their very existence to congressional legislation. 12 U.S.C. § 21 *et seq.* They are subject to the continuing detailed supervision of the Treasury Department as the myriad of Treasury rules, regulations, required reports and examinations will attest. See, *e.g.*, 12 U.S.C. §§ 21, 26, 30, 161, 481; 12 C.F.R. parts 2-14; Comptroller's Manual for National Banks (1966). As the *sine qua non* of the national banking system, national banks are the very foundation of a uniform federal banking structure which Congress established to promote the legitimate

ends of the federal government now and in the future. They are the federal instrumentalities through which the national banking system conducts nationwide operations. As the only financial institutions which are *required* to be members of the Federal Reserve System (12 U.S.C. § 222), they are indispensable vehicles for executing national fiscal policy.

The decision below, moreover, shows a complete disregard for the decisions of this Court and the state courts. The following table of cases, arranged in chronological order (all of which confirm that the states are without power to tax national banks except pursuant to the express permissive legislation of Congress), were all decided after 1913, the year that the Federal Reserve Act was adopted, and hence after the alleged metamorphosis upon which the Supreme Judicial Court primarily relies:

1922 *People ex rel. Hanover Bank* v. *Goldfogle,* 234 N.Y. 345, 137 N.E. 611.

1926 *First National Bank of Guthrie Center* v. *Anderson,* 269 U.S. 341, 347.

1927 *First National Bank* v. *Hartford, Wisconsin,* 273 U.S. 548, 550.

1931 *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239.

1934 *Austin* v. *Seattle,* 176 Wash. 654, 30 P. 2d 646.

1940 *Colorado National Bank of Denver* v. *Bedford,* 310 U.S. 41.

1942 *First National Bank of Portland* v. *Marion County,* 169 Ore. 595, 130 P. 2d 9.

1942 *O'Neil* v. *Valley National Bank of Phoenix,* 58 Ariz. 539, 121 P. 2d 646.

1944 *Commissioner of Corporations & Taxation* v. *Woburn National Bank,* 315 Mass. 505, 506.

1948 *First National Bank & Trust Co.* v. *West Haven,* 135 Conn. 191, 62 A. 2d 671.

1954 *First National Bank of Birmingham* v. *State,* 262 Ala. 155, 77 S. 2d 653.

1961 *Michigan National Bank* v. *Michigan,* 365 U.S. 467, 472.

1966 *Department of Employment* v. *United States,* 385 U.S. 355.

1967 *Northwestern National Bank of Sioux Falls* v. *Gillis,*—S.D.—, 148 N.W. 2d 293.

The second premise of the court below (*i.e.,* that 12 U.S.C. § 548, only purports to regulate the taxation of national bank shares and does not prohibit other methods of state taxation) is also incorrect. It is clear that Congress intended to limit the taxation of national banks to the four modes contained in § 548, notwithstanding the existence or nonexistence of a constitutional doctrine which would prohibit the taxation of national banks in the absence of congressional permission.

In *Bank of California* v. *Richardson,* 248 U.S. 476, this Court noted that the predecessor to § 548, which is in no way materially different from § 548 as presently in force for the purposes herein cited, was intended to control comprehensively the subject with which it dealt and thus to furnish the exclusive rule governing state taxation of national banks. This Court further noted that two provisions in apparent conflict were adopted by the Congress. First, the absolute exclusion of power in the states to tax national banks so as to prevent all interference with their operations, the integrity of their assets or the administrative governmental control over their affairs; second, preservation of the taxing power of the several states so that the financial resources engaged in the development of national banks might not be withdrawn from the reach of state taxation. The first aim was obtained by the non-

recognition of any power in the states to tax national banks except as to real estate. The second was reached by taxation of the stockholders of national banks.

> "Full and express power on that subject [taxation of national bank stockholders] was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question." Pages 483-484.

That this is the proper construction of § 548 is thrown into even bolder relief by the anomalous nature of the result reached in the opinion of the Supreme Judicial Court below. Under the reasoning of that opinion, the several states are completely free to employ any method of taxation of national banks (except perhaps for discriminatory taxation) which they see fit. The only restrictions on the states, according to the Supreme Judicial Court, are those relating to the taxation of national bank shares. This result is most perplexing. The decision below (if allowed to stand) would produce the following startling results: First, although § 548 places fairly elaborate and complex restrictions on the taxation of national bank shares, no longer (according to the Supreme Judicial Court) would this congressional legislation restrict in any manner whatsoever other methods of state taxation; and second, § 548 as so construed would be squarely in conflict with the intent of Congress.

If anything is clear from the legislative history of the original predecessor (Act of June 3, 1864, c. 106, § 41, 13 Stat. 111) to § 548, it is that Congress intended to permit

the taxation of national banks by states only in a limited fashion. The congressional debates indicate that Congress was divided into two factions—those who opposed any state taxation of national banks whatsoever, and those who favored some limited form of state taxation. The debates further indicate that Congress did not even consider the possibility of a broad statutory provision which would give the several states general permission to tax national banks. See Cong. Globe, 38 Cong. 1st Sess. 1865-1866; 1871-1874; 1889-1900; 1989, 2128-2132, 2142 (1864). Yet the decision below, rather than giving effect to this congressional intent, has construed 12 U.S.C. § 548, so that the several states would no longer be restricted to the methods of taxation expressly permitted by 12 U.S.C. § 548.

D. *The Decision Below Erred in Holding that the Massachusetts Sales Tax is a Tax on the Seller.*[4]

Massachusetts St. 1966, c. 14, § 1, subsec. 2, imposes an excise upon sales at retail in Massachusetts of tangible personal property by any vendor at the rate of 3% of the gross receipts of the vendor from such sales. It is not a tax on the privilege of selling at retail, or a so-called "occupational tax." Rather, it is a tax imposed on the sale itself.

The full amount of the tax must be *added* to the sales price and *collected* from the purchaser.

> "*Subsection 3.* Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth *shall add to the*

[4] As indicated on pages 8 to 10 hereof, this matter involves a federal question because federal rights (those of a national bank under the Constitution of the United States and 12 U.S.C. § 548) are affected.

sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts." (Emphasis supplied.)

To emphasize that the vendor is a conduit acting only as a collector of the tax, not only must the tax be added to the sales price and collected from the consumer, but also the amount of the tax must be stated and charged separately from the sales price. St. 1966, c. 14, § 1, subsec. 5. Conversely, "In determining the 'sales price' there shall be excluded . . . the amount of reimbursement of tax paid by the purchaser to the vendor . . ." St. 1966, c. 14, § 1, subsec. 1(14)(c)(iv). In addition, it is unlawful for a vendor to advertise that the tax will be absorbed or assumed by the vendor or that it will not be added to the selling price. St. 1966, c. 14, § 1, subsec. 23. The role of the vendor as merely a tax collector, rather than as the party taxed, is underscored by the fact that the vendor receives compensation for collecting the tax. St. 1966, c. 14, § 1, subsec. 14.

The true character of the Massachusetts Sales Tax as a tax on purchasers is thrown into even bolder relief by the numerous vendees who are exempt from the tax. Thus sales to the United States, the Commonwealth of Massachusetts or any political subdivision thereof and their respective agencies are exempt. Also exempt are sales to religious, scientific, charitable and educational organizations. St. 1966, c. 14, § 1, subsec. 6(d) and (e).

The test developed and applied by this Court for determining whether a sales tax is a tax on the seller or on the buyer is whether the "legal incidence" of the tax falls on the vendor or the vendee. The foregoing analysis and contention of the appellant, that the "legal incidence" of the Massachusetts Sales Tax is on the purchaser, is clearly supported by the decisions of this Court.

The leading case on this point is *Alabama* v. *King & Boozer,* 314 U.S. 1, which held that under state law the legal incidence of a tax which is imposed on a vendor but which the vendor is required to add to the sales price and collect from the purchaser is on the purchaser. It so held despite the fact that under the relevant Alabama statute the seller was denominated the "taxpayer." This case has been followed in a number of decisions of this Court.

In *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 U.S. 95, the Supreme Court held that the incidence of a North Dakota sales tax was on the purchaser, a Federal Land Bank, and hence sales to it were immunized from state taxation by congressional legislation. The sales tax provisions were strikingly similar to those of the Massachusetts Act. In holding that the legal incidence of the sales tax was on the purchaser, the court said at page 99:

> "It is clear that the North Dakota statute makes the purchaser, petitioner here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part."

To the identical effect are *Carson* v. *Roane-Anderson Co.,* 342 U.S. 232, and *Kern-Limerick, Inc.,* v. *Scurlock,* 347 U.S. 110.

A converse situation was presented in *Colorado National Bank of Denver* v. *Bedford,* 310 U.S. 41, 44. That case involved a 2% state tax on, *inter alia,* the value of safe-deposit services. The Colorado National Bank contended that as a federal instrumentality it was immune, under 12 U.S.C. § 548, from the payment of a tax on the rentals it received for such services. The court assumed the tax would be invalid if laid upon the bank, but held that the tax was upon the user of the safe-deposit boxes and not upon the bank. Hence, the tax was valid. It based this conclusion on the ground that the tax statute required ". . . as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item . . ." For this reason the court was of the view that the incidence of the tax was on the user of the safe-deposit box.

The teaching of the decisions of this Court is clear. Where a sales tax is *required* to be added to the sales price and collected from a purchaser, the legal incidence of that tax is on the purchaser. This, of course, is precisely the nature of the Massachusetts Sales Tax. St. 1966, c. 14, § 1, subsec. 3, expressly provides that ". . . each vendor in this commonwealth *shall add to the sales price* and *shall collect from* the purchaser the full amount of the tax . . ." (Emphasis supplied.) The tax, moreover, must be stated and charged separately from the sales price. In addition, vendors cannot advertise that they will absorb or assume it.

Despite the merits of the appellant's contention and the decisions of this and other courts, the Supreme Judicial Court chose to hold that the legal incidence of the Massachusetts Sales Tax is upon the vendor. Appellant submits that this was error and, inasmuch as federal rights are involved, this error can and should be corrected by this Court.

E. *A Decision by This Court will have a Substantial Impact on Other National Banks.*

The decision below, of course, directly affects approximately ninety national banks in Massachusetts. Hence a determination by this Court as to any of the questions presented on this appeal will similarly affect these same financial institutions. A decision by this Court, moreover, will have even broader consequences.

At present there is pending litigation directly relating to the application of sales and use taxes to national banks in Florida, Pennsylvania and New York.[5] The New York litigation has produced a decision in *Liberty National Bank and Trust Co.* v. *Buscaglia,* 26 App. Div. 2d 97, 270 N.Y.S. 2d 871, which has held that national banks as purchasers are immune from the sales and use taxes there in question. The court was of the opinion that only Congress could confer power to impose such taxes on national banks. That case is presently on appeal to the New York Court of Appeals. There have not yet been any decisions in the Florida and Pennsylvania cases. A decision by this Court will clearly affect all the aforementioned pending litigation as well as substantially reduce, if not entirely eliminate, litigation which will undoubtedly be generated in other states by the decision below.

Any ruling by this Court with respect to the liability of national banks for sales and use taxes will affect all the 4,471 national banks[6] located in the forty-three states which

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[5] *First National Bank of Homestead* v. *Dickinson,* N.D. Fla., Civil No. 1226, Dec. 23, 1966; *Commonwealth of Pennsylvania* v. *Northeastern National Bank & Trust Co.,* Ct. of Common Pleas, Dauphin County, Pa., Civil No. 126, April 6, 1967; *Liberty National Bank & Trust Co.* v. *Buscaglia,* 26 App. Div. 2d 97, 270 N.Y.S. 2d 871, *appeal docketed,* No. 203, Ct. of App., April 25, 1967.

[6] Annual Report of the Comptroller of the Currency, 1965-1966, p. 21.

presently impose general sales and use taxes.[7] Mention should be made of the fact that of the aforementioned jurisdictions twenty-four of them expressly exempt national banks from such taxation by way of a statutory provision, regulation or other state ruling.[8] These exemptions, which affect 2,523 national banks,[9] are no doubt grounded on what until now has been an uncontroverted rule of law, *i.e.*, that the states cannot tax national banks except as Congress permits. Thus a decision on that rule of law by this Court will in all likelihood affect every one of these state exemptions.

The opinion below, while dealing directly only with the Massachusetts Sales and Use Taxes, also affects matters extending well beyond the area of sales and use taxation. The Massachusetts decision directly attacks and (if allowed

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[7] General sales and use taxes are imposed by all states except Alaska, Delaware, Minnesota, Montana, New Hampshire, Oregon and Vermont. C.C.H. All-State Sales Tax Rep. ¶ 301.

[8] National banks have such exemptions from sales and use taxes in the following states:

Alabama	Michigan
Arizona	Missouri
Arkansas	New York
Colorado	North Carolina
Connecticut	North Dakota
Georgia	Ohio
Hawaii	South Dakota
Illinois	Texas
Indiana	Utah
Louisiana	West Virginia
Maine	Wisconsin
Maryland	Wyoming

C.C.H. All-State Sales Tax Rep. ¶ 7-125.

[9] See footnote 6.

to stand) undermines the firmly established concept that a national bank is a federal instrumentality. The relationship of national banks to the Federal Government is an important factor affecting the status of national banks under a vast spectrum of state law. A decision by this Court with respect to the status of national banks as instrumentalities of the Federal Government, therefore, would have a far-reaching effect on the extent to which states can tax, regulate and otherwise impose their authority on such banks. For this reason, such a decision would affect approximately 4,800 national banks conducting banking operations in all of the several states.[10]

Conclusion.

For the aforementioned reasons the appellant submits that the decision of the Supreme Judicial Court is plainly wrong, and that the questions presented by this appeal are properly before this Court, are substantial, and are of public importance.

Respectfully submitted,

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[10] See footnote 6.

Appendix.

Massachusetts Advance Sheets (1967), Pages 1301-1325.

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY *vs.* STATE TAX COMMISSION.

Suffolk. March 7, 1967—July 27, 1967.

Present: WILKINS, C.J., WHITTEMORE, CUTTER, SPIEGEL, & REARDON, JJ.

Taxation, Sales tax, Use tax, Exemption, Agency of the United States, Intergovernmental immunity, National bank. *Constitutional Law,* National bank, Taxation. *National Bank: Equity Jurisdiction,* Declaratory relief. *State Administrative Procedure Act. Words,* "Agency."

Reservation and report by *Reardon,* J., of a suit in equity in the Supreme Judicial Court for the county of Suffolk.

REARDON, J. This is a bill for declaratory relief under G. L. c. 231A and c. 30A, § 7, which came first before a single justice. The plaintiff, a national bank, seeks a binding declaration that it is exempt from the recently enacted Massachusetts sales and use tax, St. 1966, c. 14, §§ 1 and 2 (Act). Judicial review is also sought of emergency regulation No. 6 issued by the defendant State Tax Commission (Commission). The Commission demurred to the bill and, without waiving its demurrer, filed an answer. The parties have filed a statement of agreed facts constituting a case stated. The matter was reserved and reported without decision by the single justice.

The plaintiff is a national banking association organized under 12 U. S. C. § 21, et seq. (1964), with its principal place of business in Pittsfield. It is one of ninety national banking associations within Massachusetts. Since April 1, 1966, the plaintiff has paid sales and use taxes to its vendors on purchases of tangible personal property within the Commonwealth. The amount of these taxes totaled $575.66 during the period from April 1, 1966, to June 30, 1966. On

March 28, 1966, the plaintiff requested from the Commission a ruling or emergency regulation that national banks are exempt from Massachusetts sales and use taxes. No ruling was received by the plaintiff pursuant to its request. The Commission on May 31, 1966, issued emergency regulation No. 6, which ruled that "[t]he sale, lease, or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax."[1] This regulation remains in full force and effect. No other regulation pertaining to the sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations has been issued. The plaintiff will be unable to carry on its banking operations unless it continues to make purchases which by the provisions of emergency regulation No. 6 are deemed to be subject to the Massachusetts sales and use tax. Massachusetts vendors have refused to make retail sales of tangible personal property to the plaintiff unless it agrees to reimburse such vendors for the Massachusetts sales tax thereon.

I. The Commission's Demurrer.

We first deal with the Commission's demurrer which is based on the ground that the Act provides an exclusive remedy by which the question of sales tax liability may be raised. While § 1, subsection 22, provides that the tax abatement remedy encompassed by subsections 20–22 shall

[1] Emergency regulation No. 6 also states, "National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales." We do not consider this portion of the regulation even though the plaintiff alludes to it several times in its brief. Neither the allegations of the bill nor the facts constituting a case stated raise the question of the applicability of the Act to sales made by national banks to its customers.

be "exclusive,"[2] it contains no reference as to the proper mode of review of regulations issued by the Commission. Lacking an exclusive mode of review, judicial review of any regulation by a suit for declaratory relief is authorized by G. L. c. 30A, § 7. See *Westland Housing Corp.* v. *Commissioner of Ins.* Mass. , .[a] The Commission apparently issued emergency regulation No. 6 pursuant to its regulation making authority. G. L. c. 14, § 4. Emergency regulation No. 6 also constitutes a "regulation" within the meaning of G. L. c. 30A, § 1 (5). See Curran & Sacks, The Massachusetts Administrative Procedure Act, 37 B. U. L. Rev. 70, 77–78. Our jurisdiction extends, at the least, to a review of the validity of emergency regulation No. 6. Curran & Sacks, *supra,* at 84. That regulation places in controversy the plaintiff's claim that it is exempt from the taxes imposed by the Act under subsections 6 (a) and 6 (d) of § 1, subsection 5 (b) of § 2, and under the Constitution and laws of the United States. The Commission's demurrer should be overruled.

The issue thus presented for our determination is whether the sales and use tax imposed by the Act can be applied to purchases made by the plaintiff and other national banks doing business in the Commonwealth.

II. Statutory Exemption.

Sales and use taxes.

Section 1, subsection 6 (d), exempts "[s]ales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies."[3]

[a] Mass. Adv. Sh. (1967) 655, 661.

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[2] See also § 2, subsection 11.

[3] Section 2, subsection 5 (b), provides that the use tax provisions shall not apply to sales exempt from the taxes imposed under § 1 of the Act.

The plaintiff purports to be an "agency" of the United States and, therefore, exempt from the sales and use taxes. A statute granting an exemption must be strictly construed. "The burden of proof is upon the one claiming the exemption to show clearly and unequivocally that he comes within the terms of the exemption." *Milton* v. *Ladd*, 348 Mass. 762, 765, and cases cited. Consideration may be given to the interpretation of the Act expressed by emergency regulation No. 6 and other administrative regulations contemporaneous with the enactment of the law. See *Cleary* v. *Cardullo's Inc.* 347 Mass. 337, 343, and cases cited.

Without question, as contended by the plaintiff, national banks are subject to certain supervision by the Federal government. The same may be said of railroads, airlines, commercial carriers of mail, radio stations, and many other private concerns which enter into relationships with the government of the United States and perform governmental services. That they do so does not in and of itself make them "agencies" of the United States. A national bank is essentially a privately owned corporation, privately managed and operated in the interest of its stockholders. Whatever role a national bank has in furthering the fiscal policies of the Federal government is incidental to its primary purpose of returning profit to its stockholders. See *National Labor Relations Bd.* v. *Bank of America Natl. Trust & Sav. Assn.* 130 F. 2d 624, 627 (9th Cir.). "Instrumentalities like the national bank . . . , in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." *Emergency Fleet Corp., United States Shipping Bd.* v. *Western Union Tel. Co.* 275 U.S. 415, 425–426.[4]

[4] "The government need not perform all its functions by the use of its property and the activity of its officers, but may establish agencies to these ends. Such an agency, created not for private gain but wholly devoted to governmental purposes and wholly

Their status as private corporations will be more thoroughly explored below.[5]

In our view the Legislature intended "agency" to mean either a regularly constituted department of government or an entity which is wholly owned by the government and which exercises exclusively governmental functions. At best, the plaintiff is a creature of the United States and not entitled to an exemption as an "agency" of the United States. We therefore hold that purchases made by the plaintiff national bank are not exempt by virtue of either subsection 6 (d) of § 1 or subsection 5 (b) of § 2 of the Act as sales to an "agency" of the United States.

III. Constitutional Exemptions.

A. Sales tax.

Since the plaintiff is not exempted under the terms of subsection 6 (d) of § 1 of the Act, can there be exemption in its favor under subsection 6 (a)? That provision exempts from the imposition of the sales tax "[s]ales which the commonwealth is prohibited from taxing under the constitution and laws of the United States."

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owned by the United States, is as free from state taxation on its property and its activities as the government itself. . . . In the exertion of the powers conferred upon it by the Constitution, the United States may, in its discretion, erect corporations for private gain and employ them as its instrumentalities." *James, State Tax Commr.* v. *Dravo Contr. Co.* 302 U. S. 134, 163 (Roberts, J. dissenting).

[5] We reserve also for later discussion various judicial utterances that have characterized national banks as "agencies" or instrumentalities of the Federal government. See, e.g., *Owensboro Natl. Bank* v. *Owensboro,* 173 U. S. 664, 667–668; *First Natl. Bank* v. *Hartford,* 273 U. S. 548, 550; *Providence Inst. for Sav.* v. *Boston,* 101 Mass. 575, 584; *Central Natl. Bank* v. *Lynn,* 259 Mass. 1, 7–8; *Commissioner of Corps. & Taxn.* v. *Woburn Natl. Bank,* 315 Mass. 505, 506; *Squantum Gardens, Inc.* v. *Assessors of Quincy,* 335 Mass. 440, 444.

The Commission contends that the sales tax is not imposed upon the purchaser, as alleged by the plaintiff, but rather is a tax upon the vendors who sell tangible personal property to the plaintiff. If the tax does fall on the vendor, that the economic burden of the tax may be passed on by the vendor to the plaintiff offends neither the sovereign immunity of the United States nor the laws of the United States relative to State taxation of national banks. *Western Lithograph Co.* v. *State Bd. of Equalization,* 11 Cal. 2d 156. *National Bank of Hyde Park* v. *Isaacs, Director of Rev.* 27 Ill. 2d 205. *Federal Reserve Bank* v. *Department of Rev.* 339 Mich. 587. *National Bank* v. *Department of Rev.* 340 Mich. 573, app. dism. 349 U. S. 934. See *Alabama* v. *King & Boozer,* 314 U. S. 1, 8–9. Any exemption the plaintiff may claim under subsection 6 (a) will be controlled by whether the purchaser or the vendor bears the legal incidence of the Massachusetts sales and use taxes. *Alabama* v. *King & Boozer,* 314 U. S. 1. *Curry, Commr. of Rev. of Alabama,* v. *United States,* 314 U. S. 14. *Kern-Limerick, Inc.* v. *Scurlock, Commr. of Rev. for Arkansas,* 347 U. S. 110, 121–122.

The legal incidence of a tax has been held by the Supreme Court of the United States to be determined by "who is responsible . . . for payment to the state of the exaction." *Kern-Limerick, Inc.* v. *Scurlock, Commr. of Rev. for Arkansas,* 347 U. S. 110, 121–122. This determination is not always easy because of the similarities existing generally in the structure of State sales taxes regardless of whether the legal incidence of the tax is imposed upon the vendor [6] or

[6] In States in which the legal incidence of the tax is imposed upon the vendor, the legal basis of the tax is "for the privilege of engaging in such business" (see, e.g., Mich. Compiled Laws, 1948, § 205.52), or is a "Retailers' Occupation Tax" (see, e.g., Ill. Rev. Sts., 1965, c. 120, § 440).

upon the purchaser.[7] The economic burden of the tax is almost universally passed along to the purchaser although practical considerations necessitate its collection and remission to the State by the vendor. Notwithstanding these ambiguous aspects inhering generally in sales taxes, we confront the question of which party the General Court intended should bear the legal incidence or ultimate burden of the tax.

Our Act is neither a vendor tax nor a purchaser tax but a hybrid tax containing elements of both vendor and purchaser taxes. See Dane, The New Sales and Use Tax Law, 51 Mass. L. Q. 239, 246–249. The tax is in part a levy on the vendor for the privilege of selling at retail.[8] The liability for the sales tax is based on three per cent of a vendor's "gross receipts" from all retail sales of tangible personal property rather than the amount of taxes actually collected from purchasers.[9] St. 1966, c. 14, § 1, subsection 2. Worthy of specific note is the liability of the vendor

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[7] See Ohio Rev. Code & Serv., c. 5739.03. See also 36 Maine Rev. Sts. Anno., § 1753: "The liability for, or the incidence of, the tax on tangible personal property provided by . . . [the sales and use tax] is declared to be a levy on the consumer."

[8] Statute 1966, c. 14, § 1, subsection 7 (a), provides that "[n]o person shall do business in this commonwealth as a vendor unless a registration . . . shall have been issued to him." A vendor's failure to comply with the requirements of the statute may result in the revocation of his registration. § 1, subsection 7 (c).

[9] Most States have held this to be true even though disparities occur due to a bracket collection system similar to that contained in § 1, subsection 4. *De Aryan* v. *Akers*, 12 Cal. 2d 781. *Stevens Enterprises, Inc.* v. *The State Commn. of Rev. & Taxn. of the State of Kansas*, 179 Kans. 696. *W. S. Libbey Co.* v. *Johnson, State Tax Assessor*, 148 Maine, 410. *Piedmont Canteen Serv. Inc.* v. *Johnson, Commr. of Rev.* 256 N. C. 155. *F. W. Woolworth Co.* v. *Gray*, 77 N. D. 757. *Smoky Mountain Canteen Co.* v. *Kizer, Commr. of Fin. & Taxn.* 247 S. W. 2d 69 (Tenn.). *White* v. *Washington*, 49 Wash. 2d 718.

to make return of the tax to the Commonwealth for gross sales made by him of items where individual sales do not exceed eighteen cents.[10] § 1, subsections 2 and 4. On such items the purchaser does not reimburse the vendor for any tax whatsoever. The responsibility for payment to the Commonwealth is exclusively upon the vendor.[11] He is the "taxpayer" or person required to make returns and to pay the tax to the Commonwealth. See St. 1966, c. 14, § 1, subsections 9 and 10. See also § 1, subsection 17. The assessment and collection of unpaid taxes through both criminal and civil remedies may be made only against the vendor. § 1, subsections 15–19. Likewise, the tax abatement procedures provided by § 1, subsections 20–22, are applicable only to vendors.[12] Chapter 14, § 1, makes no provision permitting the Commonwealth to enforce the payment of the sales tax against a purchaser. Cf. N. Y. Consol. Laws, c. 59, § 1133; Ohio Rev. Code & Serv. § 5739.13.

The liability initially laid upon the vendor to remit the tax to the Commonwealth does not of necessity require the conclusion that the legal incidence of the tax is imposed upon him. A sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See *Federal Land Bank* v. *Bismarck Lumber Co.* 314 U. S. 95, 99. See also *Alabama* v. *King & Boozer*, 314 U. S. 1, 9–10. The plaintiff argues that by

[10] But see § 1, subsection 6 (t), exempting under certain conditions sales of tangible personal property through coin operated vending machines, the cost of which does not exceed ten cents.

[11] But see, as an exception, St. 1966, c. 483, amending St. 1966, c. 14, § 1, subsection 3, which provides that the sales tax on motor vehicles and trailers be paid by the purchaser to the registrar of motor vehicles rather than to the vendor.

[12] For purposes of the use tax imposed by § 2, the assessment, collection, and abatement provisions of § 1 are applicable to purchasers. § 2, subsection 11.

virtue of § 1, subsections 3 and 23 of the Act, it bears the legal incidence of the tax. Subsection 3 provides that "each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section." [13] Subsection 23 prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. However, neither subsection 3 nor 23, singly or together, imposes any sanction on a vendor who chooses not to charge the tax. His liability to the State remains at three per cent of his gross receipts whether or not he chooses to collect the tax from his purchasers.[14] The Commonwealth can proceed only against him for the collection of unpaid taxes. We are of the opinion that subsections 3 and 23 fall short of shifting the legal liability, or incidence, of the tax placed initially on the vendor to the purchaser.

There is no necessary inconsistency between imposing the legal incidence of a tax upon the vendor, yet recognizing a statutory right in the vendor to shift the tax to the purchaser. See Mich. Compiled Laws, 1948, § 205.73, as amended by PA 1949, No. 272 (Stat. Anno. 1950 Rev. § 7.544), construed in *National Bank* v. *Department of Rev.*

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[13] Section 1, subsection 4, contains a bracket system to facilitate collection of the tax from the purchaser. The statute also requires that the amount of the tax "shall be stated and charged separately from the sales price." § 1, subsection 5. See also § 1, subsection 1 (14) (c) (iv).

[14] We believe that these subsections are aimed more at the cultivation of a happy relationship between the vendors and customers than at any mandate that the taxes be collected from the purchaser. The vendor at his option may add the tax to his selling price without being accused of a price increase. At the same time, the small vendor is not put at a competitive disadvantage with larger retailers who conceivably could increase their business volume by advertising a willingness to absorb the tax. See Dane, The New Sales and Use Tax Law, 51 Mass. L. Q. 239, 248.

334 Mich. 132, 137. See also *Federal Reserve Bank* v. *Department of Rev.* 339 Mich. 587; *National Bank* v. *Department of Rev.* 340 Mich. 573, app. dism. 349 U. S. 934. The thrust of these cases is that the Michigan sales tax is upon the vendor notwithstanding the intent of the Legislature that the economic burden of the tax was to be passed on to the consumer and that such a requirement was imposed by administrative regulation. *National Bank* v. *Department of Rev.* 334 Mich. 132, 137.

We think our Act is clearly distinguishable from the North Dakota sales tax, urged by the plaintiff as "strikingly similar," reviewed by the Supreme Court of the United States in *Federal Land Bank* v. *Bismarck Lumber Co.* 314 U. S. 95.[15] That statute punished a vendor's failure to collect the tax as a misdemeanor. See N. D. Century Code (Anno.) § 57–39–16 (5). The plaintiff's reliance on *Alabama* v. *King & Boozer,* 314 U. S. 1, 7, is misplaced for the same reason. The Alabama sales tax statute reviewed in that decision made a vendor criminally liable if he failed or refused to collect the tax from the purchaser. Alabama Code, 1940, Tit. 51, § 776. Other decisions cited by the plaintiff, see, e.g., *Avco Mfg. Corp.* v. *Connelly,* 145 Conn. 161, that have relied on cases such as *Federal Land Bank* v. *Bismarck Lumber Co.* and *Alabama* v. *King & Boozer* to impose the legal incidence of the tax upon the purchaser, are equally unhelpful. Nor do we agree with *Liberty Natl. Bank & Trust Co.* v. *Buscaglia,* 26 App. Div. 2d (N. Y.) 97. That decision is in conflict with a later case, *Pierce* v. *State Tax Commn.* 52 Misc. 2d

[15] There, at p. 99, the court stated: "It is clear that the North Dakota statute makes the purchaser . . . liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part."

(N. Y.) 10, 13, which indicates, contrary to the conclusion reached in the *Buscaglia* decision, that the incidence of the New York State sales tax is upon the vendor.

We conclude that the incidence of the sales tax is upon the vendor. The plaintiff, therefore, is not entitled to an exemption under § 1, subsection 6 (a) of the Act. See cases cited, *supra*, at p. .

B. Use tax.

The exemption in § 1, subsection 6 (a), for "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States" is applicable also to the use tax. § 2, subsection 5 (b). In contrast to the sales tax, there is no doubt that the incidence of the use tax is upon the purchaser. The three per cent tax, designed to prevent the loss of sales tax revenue by out of State purchases, is imposed upon the storage, use or other consumption of tangible personal property within the Commonwealth. § 2, subsection 2. The purchaser or "user" is liable for the tax. § 2, subsection [redacted] It is his obligation to file a return and pay the tax. § [redacted], subsections 10 (a), 10 (c).[16] The provisions contained in § 1, subsections 15–22, relating to the assessment, collection, and abatement of the sales tax, are expressly applied to purchasers liable for payment of the use tax. § 2, subsection 11.

Our conclusion that the incidence of the use tax is upon the purchaser raises the question whether the Constitution and laws of the United States permit such a tax to be im-

[16] Under certain circumstances, a vendor doing business in the Commonwealth who makes sales which are subject to the use tax is required to collect the tax and give the purchaser a receipt therefor. § 2, subsection 4. Such a receipt relieves the purchaser from further liability for the tax to which the receipt refers. § 2, subsection 3. The amounts reimbursed by the purchaser to such vendors need not be stated in a return filed by the purchaser. § 2, subsections 10 (a), 10 (b).

posed upon the plaintiff and other national banks doing business within the Commonwealth. The plaintiff asserts that national banks are agencies and instrumentalities of the Federal government and as such cannot constitutionally be taxed by a State except as permitted by congressional legislation. *Central Natl. Bank* v. *Lynn,* 259 Mass. 1, 7–8. *Commissioner of Corps. & Taxn.* v. *Woburn Natl. Bank,* 315 Mass. 505, 506–507, and cases cited. *Owensboro Natl. Bank* v. *Owensboro,* 173 U. S. 664, 668. *Des Moines Natl. Bank* v. *Fairweather, Mayor,* 263 U. S. 103, 106. *First Natl. Bank* v. *Hartford,* 273 U. S. 548, 550. *Iowa-Des Moines Natl. Bank* v. *Bennett,* 284 U. S. 239, 244.

Virtually all of these decisions and the doctrine which they espouse rely ultimately on Chief Justice Marshall's noted opinion in *M'Culloch* v. *Maryland,* 4 Wheat. 316. That case arose when Maryland imposed a tax upon notes issued by banks not chartered by the State Legislature in an attempt to drive the second national bank from Maryland. This tax directly interfered with a function crucial to the success of the bank, for the issuance of notes was a principal means of obtaining capital to be utilized for loans or other profit making activities. Moreover, the tax was levied upon an institution to which Congress had delegated important governmental functions.[17] In holding the tax invalid, Chief Justice Marshall recognized the grave danger to the Federal government from a discriminatory State tax

[17] See Act of April 10, 1816, c. 44, 3 Stat. 266. For example, the United States owned twenty per cent of the capital stock of the second national bank. § 6. The President was empowered to appoint, subject to the approval of the Senate, five of the twenty-five directors of the bank. § 8. Notes issued by the bank were made legal tender for all Federal debts. § 14. The bank was made the depository of public funds of the United States. § 16. Upon the request of the Secretary of the Treasury, the bank was required to transfer public funds from place to place without charge. § 15.

levied on an important fiscal agent of the United States. See 4 Wheat. 316, 431. The Chief Justice did, however, acknowledge that inherent power existed in the States to lay certain taxes on such an instrumentality. 4 Wheat. 316, 436. Unfortunately, this decision, as well as the later case of *Osborn* v. *The Bank of the United States,* 9 Wheat. 738, in which the court held unconstitutional a discriminatory Ohio tax levied upon the bank, established a doctrine of absolute intergovernmental immunity, regardless of the nature of the tax, which was to flower for the ensuing century. This doctrine was later referred to by Justice Frankfurter as a "web of unreality . . . [which] withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism." *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 490.

The case of *Owensboro Natl. Bank* v. *Owensboro,* 173 U. S. 664, is to be read with this prior history in mind. There, in 1899, the Supreme Court held invalid a nondiscriminatory franchise tax of the State of Kentucky levied against a national bank created by the National Bank Act of 1863. The court, purporting to rely on its earlier decisions in the *M'Culloch* and *Osborn* cases, as well as in *Davis* v. *Elmira Sav. Bank,* 161 U. S. 275, held that a State is wholly without power to levy any tax upon national banks save that permitted by congressional act. No attempt was made to distinguish between the discriminatory taxes held invalid in the *M'Culloch* and *Osborn* cases and the tax levied by the State of Kentucky.

We do not believe we should be led by a blind reliance on stare decisis. The plaintiff cites no case in this century where the Supreme Court of the United States has struck down on constitutional grounds a nondiscriminatory State tax on a privately owned enterprise which is alleged to be

an instrumentality of the United States. On the other hand, the Supreme Court has in recent years curtailed sharply the application of the doctrine of implied intergovernmental immunity to instrumentalities of the Federal government. See *United States* v. *Allegheny County*, 322 U. S. 174, 176–177; Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 632; and Powell, The Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757.

In addition, a metamorphosis has taken place in the nature and functions of national banks. There is litfle resemblance between the operation of today's national bank and that of the second national bank or of national banks at the time the *Owensboro* case was decided by the Supreme Court. It is thus our belief that the plaintiff's claim to immunity is to be judged according to contemporary conditions under principles enunciated in the more recent Supreme Court decisions relating to implied constitutional immunity of purported instrumentalities of the United States.

There has never been any doubt that a State cannot lay a tax upon the United States itself. *M'Culloch* v. *Maryland*, 4 Wheat. 316. *Mayo* v. *United States*, 319 U. S. 441. *United States* v. *County of Allegheny*, 322 U. S. 174. *Kern-Limerick, Inc.* v. *Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110. Unfortunately there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax immune instrumentality of the United States. *Department of Employment* v. *United States*, 385 U. S. 355, 358–359.[18] The appli-

[18] See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 522–524: "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and

cation of the principle of implied immunity "has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system." *James, State Tax Commr.* v. *Dravo Contr. Co.* 302 U. S. 134, 150. Such a claim must be narrowly construed. "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax. . . ." *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 483.

The plaintiff's claim to implied constitutional immunity rests on the authority of decisions, cited previously, which

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directly exercises its sovereign powers, are immune from the taxing power of the other. . . .

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. . . .

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. . .

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it."

characterized national banks as agencies and instrumentalities of the United States in construing their status under the National Bank Act.[19] That Act was entitled: "An Act to provide National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof." It authorized the formation of national banks to be employed as depositories and financial agents of the Federal government, but especially to be employed in facilitating the collection of internal duties and the transfer and disbursement of public moneys, and in furnishing a safe and uniform note circulation. See *Van Allen* v. *The Assessors,* 3 Wall. 573, 582, 589–590. The functions conferred upon the national banks were not unlike those granted to their earlier predecessors, the United States Bank and the second United States bank. During the next half century the national banks played an important role in the establishment and supervision of national monetary policy. In addition, the banks performed some minor services beyond their enumerated powers pursuant to an authorization to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Act of June 3, 1864, c. 106, § 8, 13 Stat. 101.

The Federal Reserve Act of 1913[20] reduced considerably the importance of national banks as fiscal agents of the United States. Welch, State and Local Taxation of Banks in the United States, New York Tax Commission: Special Report No. 7, p. 209. That Act, passed "To Provide for the establishment of Federal Reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of bank-

[19] The Act was originally passed in 1863, Act of February 25, 1863, c. 58, 12 Stat. 665, but was amended considerably in 1864, Act of June 3, 1864, c. 106, 13 Stat. 99.

[20] Act of December 23, 1913, c. 6, 38 Stat. 251.

ing in the United States, and for other purposes," placed upon the Federal Reserve System the responsibility of establishing and maintaining a national fiscal and monetary system. In effect, the Federal Reserve System assumed in large part the functions and responsibilities conferred in earlier years on the first two banks of the United States and successor national banks.

The Federal Reserve System also assumed responsibility relative to the entire banking industry. No longer are national banks the exclusive depository of government funds but Federal reserve banks and all member banks, regardless of whether they are State or national banks, are authorized to be Federal depositories. § 15, 38 Stat. 265, as amended, 12 U. S. C. § 391 (1964). Although national banks are required to be members of the Federal Reserve System, State chartered banks may also become members. § 9, 38 Stat. 259, as amended, 12 U. S. C. § 321 (1964). Ninety-five per cent of all banks are insured by the Federal Deposit Insurance Corporation. *United States* v. *Philadelphia Natl. Bank,* 374 U. S. 321, 327. See § 5, 64 Stat. 876, as amended, 12 U. S. C. § 1815 (1964). This in itself subjects these banks to extensive supervision and control. "State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks." *United States* v. *Philadelphia Natl. Bank,* 374 U. S. 321, 327. Professor Davis has called Federal supervision of banking "[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision." 1 Davis, Administrative Law Treatise, § 4.04, at p. 247.

In exchange, it seems, for the transfer of governmental functions from the national banks to the Federal Reserve System, Congress broadened the powers of national banks to engage in general banking. Welch, *supra,* at pp. 33–35.

Almost thirty years ago the Supreme Court remarked that "[t]hough the national banks' usefulness as an agency to provide for currency has diminished markedly, their importance as general bankers shows a constant growth." *Colorado Natl. Bank* v. *Bedford*, 310 U. S. 41, 48. This growth dates from the passage of the Federal Reserve Act of 1913. Although the National Bank Act had prohibited national banks from making mortgage loans, Act of June 3, 1864, c. 106, § 28, 13 Stat. 108, the authority to make such loans was allowed in 1913 and expanded thereafter. § 24, 38 Stat. 273, as amended, 12 U. S. C. 371 (1964). See *Michigan Natl. Bank* v. *Michigan*, 365 U. S. 467, 471–472. The reduction of reserve requirements for "time" or "savings" deposits, see, e.g., § 19, 38 Stat. 270, as amended, 12 U. S. C. § 462 (1964), placed national banks in a better position to compete with State banks for savings accounts. The Federal Reserve Act also provided for the granting of fiduciary powers to national banks. § 11 (k), 38 Stat. 262, as amended. 12 U. S. C. § 92a (a) 1964. The McFadden Act of 1927 expressly allowed national banks to buy and sell securities other than Federal and State obligations. Act of February 25, 1927, c. 191, § 2, 44 Stat. 1226, as amended, 12 U. S. C. § 24 (1964).

The sum total of the changes wrought during this century has been the assumption by the Federal Reserve System of the role of fiscal agent for the Federal government. The relegation of national banks to their present status as general commercial bankers makes any difference between them and their State chartered competitors hard to discern. The similarities between them are infinitely striking. Given a national bank and a State chartered trust company operating in the same community, one may know that both will have savings departments paying interest generally at an

even rate. Both will engage in the business of commercial and real estate loans in competition. Both may have trust departments serving the same purpose. With the contemporary extension of the banking business into other allied fields both will compete in the area of similar sales and services. Both enjoy equal benefits from the protection of local and State government. Both are in business for the purpose of profit. In this highly mechanized day both will require expensive business machines either purchased in or without the State. Both will need real estate and attractive buildings in which to do business.

There are few dissimilarities. National banks are creatures of the Federal government in that they owe their very existence to congressional legislation. 12 U. S. C. § 21 (1964). They are required to be members of the Federal Reserve System. 12 U. S. C. § 222 (1964). The sole modern distinction of importance between the two lies in the fact that one is subject to Federal supervision, 12 U. S. C. §§ 21–215b (1964), while the other is supervised directly by the Massachusetts Commissioner of Banks under G. L. c. 167, §§ 1–11C.

We do not find these differences sufficient to exempt the plaintiff from the imposition of a nondiscriminatory tax of general application such as the use tax imposed by § 2 of the Act. That national banks were originally chartered by Congress is of historical interest but has little relevance in the determination of whether intergovernmental immunity should exist. *Railroad Co.* v. *Peniston,* 18 Wall. 5, 34. That they are required to join the Federal Reserve System makes them no more indispensable vehicles for effectuating national fiscal policy than the State chartered members of the system. In view of the increasingly massive Federal control over all aspects of the national economy, and particularly commercial banking, supervision by the Depart-

ment of the Treasury of what is otherwise a privately owned institution engaged in the pursuit of profit does not bring the plaintiff to the close relationship with the government necessary to imply immunity under the Constitution.

A comparison with the two recent instances in which the Supreme Court of the United States has granted an entity other than the United States status as a tax immune instrumentality reveals the weakness of the plaintiff's claim to immunity. *Standard Oil Co. of Cal.* v. *Johnson, Treas. of Cal.* 316 U. S. 481, involved an attempt by California to impose a tax on the privilege of distributing motor vehicle fuel on United States Army post exchanges. The court concluded, after a detailed examination of the activities of United States Army post exchanges, all of which were governmental in nature, that post exchanges "as now operated are arms of the Government deemed by it essential for the performance of governmental functions." 316 U. S. 481, 485. The holding of the court was not placed on constitutional grounds, the case being sent back for a further interpretation of the State statute in the light of the court's conclusion as to the status of post exchanges. Very recently the court held that the Red Cross is a Federal instrumentality for purposes of tax immunity. *Department of Employment* v. *United States,* 385 U. S. 355. It thus held invalid as applied to employees of the Red Cross a Colorado payroll tax designed to protect employment security.[21] After reviewing its extensive and almost all pervasive relationship with the United States, Justice Fortas

[21] In contrast to the status of employees of the Red Cross and other servants of the government which is peculiarly a matter of Federal concern, employees of national banks are expressly subjected to State unemployment laws. 26 U. S. C. § 3305 (e) (1964). See 26 U. S. C. § 3306 (c) (6) (1964).

found that the Red Cross functioned "virtually as an arm of the Government." [22]

No contention can be made that the plaintiff functions as "an arm of the Government" as do the United States Army post exchanges or the Red Cross. Furthermore, there has been an unmistakable trend in recent Supreme Court decisions, many of which overrule earlier precedent, to deny implied constitutional immunity from State taxation to essentially private persons, both individual and corporate, who conduct businesses for profit and at the same time perform some governmental functions. In *James, State Tax Commr.* v. *Dravo Contr. Co.* 302 U. S. 134, the court sustained a West Virginia tax upon the income of a contractor derived from building locks and dams for the Federal government in that State. The cases of *Helvering, Commr. of Int. Rev.* v. *Gerhardt,* 304 U. S. 405, and *Graves* v. *New. York ex rel. O'Keefe,* 306 U. S. 466, upset a century of precedents by permitting the application of the income

[22] 385 U. S. 355, 359–360. In explaining why the Red Cross is a tax exempt instrumentality of the United States, Justice Fortas further stated: "Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U. S. C. § 1, et seq. Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government" (footnotes omitted) pp. 359–360.

taxes of each entity to employees of the other. The Supreme Court has held valid State sales and use taxes imposed upon contractors employed by the Federal government on a cost-plus-fixed fee basis even though the financial burden of the tax was passed on to the United States. *Alabama* v. *King & Boozer,* 314 U. S. 1 (sales tax). *Curry* v. *United States,* 314 U. S. 14 (use tax). See *United States* v. *Boyd, Commr.* 378 U. S. 39, 48–51. In *Oklahoma Tax Commn.* v. *Texas Co.* 336 U. S. 342, lessees of exempt Indian lands were held liable for State gross production and excise taxes on petroleum produced from such lands. More recently the court upheld a Michigan statute which imposed a real property tax on private parties using otherwise tax exempt property belonging to the Federal government. *United States* v. *Detroit,* 355 U. S. 466. *United States* v. *Muskegon,* 355 U. S. 484. *Detroit* v. *Murray Corp. of America,* 355 U. S. 489. The most striking of these Michigan cases is the one involving Muskegon. There the tax was sustained even though Continental Motors Corporation was using a government owned plant for the performance of government contracts without a lease or other cognizable property interest. "The vital thing," stated the majority, "is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." 355 U. S. at p. 486.

The "Michigan cases" suggest that only a "servant" of the Federal government may gain Federal immunity. Van Cleve, States' Rights and Federal Solvency, 1959 Wis. L. Rev. 190, 206. At the least, they establish the proposition that privately owned corporations organized for profit which perform some governmental functions are not thereby

immunized from nondiscriminatory State taxes of general application. Well before these cases, Professor Thomas Reed Powell, in criticizing the absolute immunity doctrine, called for recognition that some governmental activity may be business activity and should not thereby be automatically withdrawn from State taxation. Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633, 651 ff. The coexistence of private and governmental functions has come to be recognized in other fields. For example, national banks have been held to be private corporations for various purposes of Federal law. See *United States* v. *Philadelphia Natl. Bank,* 374 U. S. 321 (anti-trust laws); *United States* v. *First Natl. Bank & Trust Co.* 376 U. S. 665 (anti-trust laws). See also *National Labor Relations Bd.* v. *Bank of America Natl. Trust & Sav. Assn.* 130 F. 2d 624 (9th Cir.) (labor law). In an age of increased Federal involvement in all aspects of the national economy, recognition of the coexistence of private and governmental functions is necessary in order that the States may not be deprived of needed revenue. See generally Pierce, Tax Immunity Should Not Mean Tax Inequity, 1959 Wis. L. Rev. 173. This recognition would tend to prevent a benefit from running to an essentially private interest at the expense of the taxing government and without a corresponding benefit to the government in whose name the immunity is claimed. See *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 483.

Such an approach also fosters a sound tax policy of equality which dictates that all business for profit within a State share the cost of government services provided to all. The importance of preserving this tax equality between business competitors was recognized by the Supreme Court in the "Michigan cases." "As suggested before the legislature apparently was trying to equate the tax burden im-

posed on private enterprise using exempt property with that carried by similar businesses using taxed property. . . . In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility." *United States* v. *Detroit*, 355 U. S. 466, 473–474. The plaintiff national bank enjoys the benefits of State and local services, the protection of the laws of the State, access to its courts, and the patronage of its citizens. That the plaintiff should escape a tax borne by its State chartered competitors, many of which are members of the Federal Reserve System, is manifestly unjust. Were it to be held that the use tax was not applicable to national banks the competitive disadvantage to which they would put their State chartered competitors is as obvious as it is inequitable. Moreover, equality helps to slow the rate of bank mergers and other efforts of State chartered banks to escape State supervision as well as obtain a commercial advantage. See *United States* v. *Philadelphia Natl. Bank*, 374 U. S. 321; *United States* v. *First Natl. Bank & Trust Co.* 376 U. S. 665.

We find nothing in the Constitution of the United States or the recent Supreme Court decisions interpreting it to prevent the application of the use tax to purchases made by the plaintiff and other national banks doing business in the Commonwealth. "There . . . [is] no discrimination against the Federal Government, its property or those with whom it does business. There . . . [is] no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property. Cf. *M'Culloch* v. *Maryland*, 4 Wheat. 316." *Detroit* v. *Murray Corp. of America*, 355 U. S. 489, 495. In fact, were we to construe subsection 5 (b) of § 2, or subsections 6 (d) and 6 (a) of § 1, to exempt

this small group of privately owned institutions which have neither the need nor the right to such protection, could it not be said that serious constitutional problems under the Fourteenth Amendment of the Constitution of the United States would arise?

IV. Exemption under 12 U. S. C. § 548 (1964).

Finally, we confront the question whether the application of the use tax to purchases made by national banks violates any law of the United States. The plaintiff asserts that Rev. Sts. § 5219, as amended, 12 U. S. C. § 548 (1964), prohibits the imposition of such a tax upon a national bank. That provision, dealing with State taxation of national bank shares, provides in relevant part as follows: "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause." (Subdivision [c] places certain limits on taxes measured by net income and requires that the tax rate not be higher on national banks than other financial, mercantile, manufacturing, and business corporations doing business within the State.)

We recognize that § 548 has been interpreted to be the extent to which Congress has permitted State taxation of national banks. *Commissioner of Corps. & Taxn.* v. *Woburn Natl. Bank,* 315 Mass. 505, 506–507, and cases cited.

Owensboro Natl. Bank v. *Owensboro*, 173 U. S. 664, 668–669. *Des Moines Natl. Bank* v. *Fairweather, Mayor*, 263 U. S. 103, 106. *First Natl. Bank* v. *Anderson, County Auditor*, 269 U. S. 341, 347. *First Natl. Bank* v. *Hartford*, 273 U. S. 548, 550–551. *Iowa-Des Moines Natl. Bank* v. *Bennett*, 284 U. S. 239, 244. *Colorado Natl. Bank* v. *Bedford*, 310 U. S. 41, 50–51. See *Michigan Natl. Bank* v. *Michigan*, 365 U. S. 467, 470; *Department of Employment* v. *United States*, 385 U. S. 355, 360. The soundness of this construction of § 548 has been questioned. Note, Schweppe, State Taxation of National Bank Stocks: Uncertainty of its Constitutional Basis, 6 Minn. L. Rev. 219. Traynor, National Bank Taxation in California, 17 Cal. L. Rev. 83, 84–94. The principle that § 548 stands as the outer limit of State power to tax national banks, first advanced in *Owensboro Natl. Bank* v. *Owensboro*, 173 U. S. 664, necessarily depends on the underlying premise that absent such a statute the Constitution of the United States would prohibit a tax levied upon a national bank. Only if that preliminary conclusion is made can § 548, which only purports to regulate taxation of national bank shares, be interpreted to forbid the States from imposing other taxes on national banks. As already pointed out, we do not believe that this underlying premise, that the Constitution confers immunity on national banks, remains valid when judged in the light of recent decisions of the Supreme Court of the United States.

From the recent trend of Supreme Court decisions restricting severely the doctrine of implied constitutional immunity has emerged a countervailing principle. In these decisions the Supreme Court, while curtailing immunity as a matter of constitutional law, has indicated that Congress, if it desires, may confer immunity by statute. *United States* v. *Detroit*, 355 U. S. 466, 474, 475. Congress "has under the Constitution exclusive authority to determine

whether and to what extent its instrumentalities . . . shall be immune from state taxation." *Maricopa County* v. *Valley Natl. Bank*, 318 U. S. 357, 361. *James, State Tax Commr.* v. *Dravo Contr. Co.* 302 U. S. 134, 160–161. *Pittman, Clerk of the Superior Court of Baltimore* v. *Home Owners' Loan Corp.* 308 U. S. 21, 32–33. *Oklahoma Tax Commn.* v. *United States*, 319 U. S. 598, 606–607. See, e.g., *Federal Land Bank* v. *Bismarck Lumber Co.* 314 U. S. 95; *Carson* v. *Roane-Anderson Co.* 342 U. S. 232; *Federal Land Bank* v. *Board of County Commrs. of Kiowa County, Kansas*, 368 U. S. 146.

Such immunity, however, must be expressly conferred. The Supreme Court of the United States has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering, Commr. of Int. Rev.* 307 U. S. 57, 60. *Oklahoma Tax Commn.* v. *United States*, 319 U. S. 598, 606. This rule has been rigidly applied in the area of intergovernmental immunity. Congress has not created an immunity here by affirmative action, and "[t]he immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. *Oklahoma Tax Commn.* v. *United States*, 319 U. S. 598, 604." *Oklahoma Tax Commn.* v. *Texas Co.* 336 U. S. 342, 366. "Silence of Congress implies immunity no more than does the silence of the Constitution. . . . [I]f it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480.

Any construction of § 548 which would prohibit the imposition of a use tax upon a national bank must rest on implication since the section, by its terms, does not purport to prohibit any taxation. Such an implied prohibition

would be in marked contrast with numerous other statutory tax exemptions created by Congress.[23] The thrust of the recent decisions of the Supreme Court on intergovernmental tax immunity indicates that a statute like § 548 is not to be interpreted in a manner inconsistent with its express terms. For these reasons the application of the use tax to purchases made by the plaintiff does not violate any law of the United States.

V. Conclusion.

We are of the opinion that the plaintiff is not exempted from the taxes imposed by §§ 1 and 2 of the Act by virtue of subsections 6 (a) or 6 (d) of § 1, or of subsection 5 (b) of § 2. An interlocutory decree is to be entered overruling the demurrer. A final decree is to be entered declaring that emergency regulation No. 6 is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes.

So ordered.

Cutter, J. (concurring) The later part of the opinion of the court takes the position, with which I agree, that the Constitution of the United States and 12 U. S. C. § 548 (1964) do not prevent the imposition of a nondiscriminatory State use tax with respect to a situation or transaction in which a national bank has become the purchaser and user of tangible personal property. Similar considerations seem

[23] See, e.g., 12 U. S. C. § 531 (1964) (Federal reserve banks); 12 U. S. C. § 931 (1964) (Federal land banks); 12 U. S. C. § 931 (1964) (Federal land bank associations); 12 U. S. C. § 1433 (1964) (Federal home loan banks); 12 U. S. C. § 1464 (h) (1964) (Federal savings and loan associations); 12 U. S. C. § 1723 (c) (1964) (Federal National Mortgage Association); 12 U. S. C. § 1768 (1964) (Federal credit unions); 12 U. S. C. § 1825 (1964) (Federal Deposit Insurance Corporation).

to me to permit the imposition of a nondiscriminatory State sales tax with respect to a transaction in which a national bank is the purchaser of tangible personal property. I concur in the result of the opinion of the court on this ground which seems to me to be implicit in what the opinion of the court says about the use tax. In my view, there is no occasion to decide whether the legal incidence of the Massachusetts sales tax is upon such a national bank as a retail purchaser or upon its vendor.

Ronald H. Kessel (*Alex J. McFarland* with him) for the plaintiff.

David Berman, Assistant Attorney General, for the State Tax Commission.

Acts and Resolves.

STATUTE 1966, CHAPTER 14.

[Advance Copy, 1966 Massachusetts Acts and Resolves, Pages 6-55.]

TAXATION OF RETAIL SALES OF TANGIBLE PERSONAL PROPERTY.

SECTION 1. A tax on retail sales is imposed in accordance with the following subsections:—

Subsection 1. Definitions.—When used in this section the following words, terms and phrases shall have the following meaning except where the context clearly indicates a different meaning:—

. . . . . .

(14) "Sales price", the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise.

. . . . . .

(*c*) In determining the "sales price" there shall be excluded . . . (*iv*) the amount of reimbursement of tax paid by the purchaser to the vendor under section; . . .

. . . . . .

IMPOSITION AND RATE OF TAX.

Subsection 2. An excise is hereby imposed upon sales at retail of tangible personal property in this commonwealth by any vendor at the rate of three per cent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this section.

Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

Subsection 4. For the purpose of adding and collecting the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof, to be reimbursed to the vendor by the purchaser, the following formula shall be in force and effect as follows:—

Amount of Sale.	*Amount of Tax.*
$0.01 to $0.18 inclusive	No tax
.19 to .38 inclusive	1 cent
.39 to .78 inclusive	2 cents
.79 to 1.18 inclusive	3 cents

In addition to a tax of three cents on each full dollar, a tax shall be collected on each part of a dollar in excess of a full dollar in accordance with the above formula.

Subsection 5. Upon each sale of tangible personal property taxable under the provisions of this section the amount of tax collected by the vendor from the purchaser under the provisions of this section shall be stated and charged separately from the sales price and shown separately on any record thereof at the time the sale is made, or on any evidence of sale issued or used by the vendor.

Subsection 6. Exemptions.—The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:—

(*a*) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.

. . . . . .

(*d*) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies.

(*e*) Sales to any corporation, foundation, organization or institution, organized exclusively for religious, scientific, charitable or educational purposes, including hospitals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; . . .

. . . . . .

(*t*) Sales of tangible personal property through coin operated vending machines at ten cents or less, provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the commission.

. . . . . .

REGISTRATION OF VENDORS.

Subsection 7. Registration of Vendors.—(*a*) *Application for Registration.* No person shall do business in this

commonwealth as a vendor unless a registration or registrations shall have been issued to him as hereinafter described. Every person desiring to do business in this commonwealth as a vendor shall file with the commissioner for each place of business an application for registration, in such form as the commissioner with the approval of the commission, prescribes, giving such information as the commissioner requires. At the time of making the application, such person shall pay to the commissioner a registration fee of one dollar for each registration.

(*b*) *Issuance of Registration.* After compliance with the provisions of paragraph (*a*) by the applicant, the commissioner may issue to such applicant a separate certificate of registration for each place of business within the commonwealth. The certificate of registration shall not be assignable; shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein; and shall at all times be conspicuously displayed at the place for which issued.

(*c*) *Suspension or Revocation of Registration.* The commissioner may suspend or revoke the registration of any person or may refuse to issue any such registration for failure to comply with the provisions of this section or with all pertinent rules and regulations of the commission promulgated hereunder. Any person aggrieved by such suspension, revocation or refusal may, within ten days after written notice thereof has been mailed or delivered to him, apply to the commission for a hearing setting forth in such application a full statement of the grounds on which he intends to rely; provided, that he has filed with the commission at the time of making such application a surety company bond running to the commonwealth, with a surety company authorized to do business in the commonwealth as surety, in such sum as the commission shall fix, conditioned upon the payment of all taxes then due

under this section and to become due during the pendency of such appeal to the commission and of any further appeal to the appellate tax board or to the supreme judicial court. After such hearing, the commission shall give written notice of its decision. Any person aggrieved by a decision of the commission under this section may appeal therefrom to the appellate tax board within ten days after such written notice has been mailed or delivered to him. Such appeals to the appellate tax board shall be preferred cases to be heard, unless cause appears to the contrary, in priority to other cases. During the pendency of any such appeal to the commission or to the appellate tax board or to the supreme judicial court, the suspension or revocation so appealed from shall be inoperative. In the case of an appeal from the refusal of the commissioner to issue a registration, the commissioner shall issue such registration during the pendency of the appeal.

A person whose registration has been suspended or revoked shall pay to the commissioner a fee of five dollars for the reissuance of a registration. The commissioner shall not issue a new registration after the suspension or revocation of a registration unless he is satisfied that the former holder of the registration will comply with the provisions of this section and with all pertinent rules and regulations thereunder.

(*d*) *Failure to Register.* Any person who fails to register as required by this subsection and does business in this commonwealth as a vendor shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars. The superior court may on petition of the commissioner restrain such person from doing business as a vendor in this commonwealth.

RETURNS AND PAYMENT OF TAX.

Subsection 9. Filing of Returns.—On or before the twentieth day of each calendar month, each vendor who has made any sale at retail taxable under the provisions of this section during the preceding calendar month shall file a return with the commissioner. Such returns shall be filed upon a form furnished by the commissioner and approved by the commission and containing such information reasonably necessary for the administration of this section as the commissioner may require. The commission may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis. Upon application of a vendor, the commissioner may issue a classified permit establishing such vendor's percentage of exempt sales. Such classified permits may be amended or revoked as to classification whenever the commissioner shall determine that the percentage of exempt sales is inaccurate or that such classification is not appropriate.

Subsection 10. Payment of Tax.—At the time of filing his return as provided by this section, the vendor shall pay to the commissioner the taxes imposed by this section. The taxes for the period for which a return is required to be filed by a vendor under this section shall be due and payable to the commissioner on the date established for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of gross receipts and taxes due thereon.

. . . . . .

Subsection 14. Compensation for Collecting Tax.—For the purpose of defraying in whole, or in part, his expenses in keeping the records prescribed and collecting and remitting the tax imposed by this section, the taxpayer shall be

entitled to deduct and withhold from the taxes otherwise due from him two per cent thereof, provided he has complied with all of the requirements of this section and all pertinent rules and regulations of the commission promulgated hereunder.

Subsection 15. Assessment of tax.—(a) In General.—The tax imposed by this section shall be deemed to be assessed at the amount shown as the tax due on the return filed under the provisions of this section and on any amendment, correction or supplement thereof or at the amount properly due under this section; whichever is less.

(*b*) *Assessment of Deficiencies.*—If the commissioner determines from the verification of a return, or otherwise, that the full amount of any tax due under this section, or any portion thereof, has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was due, whichever occurs later, assess the same with interest as provided in subsection nineteen to the date when the deficiency assessment is required to be paid hereunder, first giving notice to the vendor to be assessed of his intention; and such vendor or a representative of the vendor shall thereupon have an opportunity, within thirty days after the date of such notification, to confer with the commissioner or his duly authorized representative as to the proposed assessment. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of the tax remaining due the commonwealth, or any portion thereof, which he believes has not theretofore been assessed and shall give notice to the vendor so assessed. One or more deficiency assessments may be made of the amount due for one or for more than one period. Any tax so assessed shall be paid to the commissioner within fourteen days after the date of the notice of assessment.

In the case of an arithmetic or clerical error apparent upon the face of the return, the commissioner may assess a deficiency attributable to such error without giving prior notice of his intention to the vendor to be assessed.

(*c*) *Refund of Overpayments.*—If, on the verification of a return, or otherwise, the commissioner determines that an overpayment of the full amount of any tax, and interest and penalties thereon, due under this section with respect to such return has been made by the vendor, the amount of such overpayment may, in his discretion, be deducted from any unpaid amounts due for other periods or on other returns of the vendor. The balance of such overpayment shall be refunded to the vendor if it exceeds ten dollars; if such balance is ten dollars or less, it may be refunded in the discretion of the commissioner. Interest upon such refund at six per cent per annum shall be paid from a date six months after the date of the payment of said amount to the commissioner, the date upon which the return was due or the date upon which the return was filed, whichever is the latest.

(*d*) *Extension by Agreement.*—If, before the expiration of the time prescribed under paragraph (*b*) for the assessment of any deficiency, the commissioner and the vendor consent in writing to extend the time for the assessments of any deficiency, the commissioner or his duly authorized representative may inspect and examine the records of the vendor as provided in subsection twelve, may give any notice of intention to assess required by this subsection and may assess any deficiency at any time prior to the expiration of the extended time. The period so extended by the commissioner and the vendor may be further extended by subsequent agreements in writing made before the expiration of the time last extended.

(*e*) *Exceptions to Assessment Limitation.*—The commissioner may assess the tax imposed by this section at any time if a vendor has filed no return; has filed a false or fraudulent return with intent to evade the tax imposed by this section; or has filed a return with a wilful attempt in any manner to defeat or evade the tax imposed by this section.

(*f*) *Notice of Assessment.*—If the assessment of any tax is in excess of the amount shown on the return as the tax due, the commissioner shall, as soon as may be, give written notice to the vendor of the amount of the assessment, the amount of any balance due and the time when the same is required to be paid, but failure to receive such notice shall not affect the validity of the tax.

Subsection 16. Collection of Unpaid Taxes.—Assessed taxes remaining unpaid after the date upon which the same are required to be paid shall bear interest at the rate of six per cent per annum until paid, which shall be added to and become part of the tax. Every person who fails to pay to the commissioner any sums required by this section shall be personally and individually liable therefor to the commonwealth. The term "person", as used in this subsection, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to pay over the taxes imposed by this section.

Subsection 17. Remedies for Collection.—The commissioner shall have for the collection of taxes imposed by this section all the powers and remedies provided by chapter sixty of the General Laws for the collection of taxes on personal estate by collectors of taxes of towns. Any warrant for the collection of a tax imposed under this section may be issued to any deputy collector, sheriff, deputy sheriff or constable, and he shall have authority to proceed thereunder anywhere within the commonwealth. The offi-

cer, to whom a warrant for the collection of such a tax is given, shall collect said tax, penalties and interest as herein provided, including the charges and fees provided in section fifteen of chapter sixty, and shall pay over such amounts collected to the commissioner. Such officer, other than a deputy collector, may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount.

The commissioner may recover any tax imposed by this section in an action of contract in the name of the commonwealth. Any tax imposed by this section may also be collected by any information brought in the supreme judicial court by the attorney general at the relation of the commissioner. The court may issue an injunction upon such information, restraining the further prosecution of the business of the vendor until such taxes, with interest and costs thereon, have been paid.

Interest, penalties and additional taxes imposed under this section may be recovered in the manner provided for in this subsection.

Subsection 18. Jeopardy Assessments.—If the commissioner believes that the collection of any tax imposed by this section will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest and penalties, the assessment of which is provided for by law). Such tax, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commissioner for the payment thereof. Upon failure or refusal to pay such tax, penalty and interest, the commissioner shall proceed forthwith to the collection thereof.

Subsection 19. Interest and Penalties.—(*a*) *Interest.*—All taxes imposed by this section shall be due and payable on or before the due date of the return, determined without regard to any extension of time. The portion of any taxes not paid on or before said date shall bear interest from said date at the rate of one half of one per cent per month, or major fraction thereof, until it is paid. Deficiency assessments made under subsection fifteen and additional taxes assessed under paragraph (*c*) of this subsection shall include interest as provided in this subsection to the date when the tax so assesed or any unpaid balance thereof is required to be paid. Interest so assessed shall become a part of the tax.

(*b*) *Penalty for Late Returns.*—If any vendor required to file a return under this section fails to file such return within the time prescribed by this section, there shall be added to and become a part of the tax, as an additional tax, a sum equal to one half of one per cent of the tax ultimately determined to be due for each month, or major fraction thereof, that the vendor is in default, but not less than ten dollars.

(*c*) *Additional Tax.*—If a vendor who has been notified by the commissioner that he has failed to file a return or has filed an incorrect or insufficient return, refuses or neglects within thirty days after the date of such notification to file a proper return, or if a vendor has filed a false or fraudulent return or has filed a return with a wilful attempt in any manner to defeat or evade the tax, the commissioner shall determine, according to his best information and belief, the sales and gross receipts of such vendor taxable under this section and shall assess the same at not more than double of the amount so determined, which additional tax shall be in addition to the other penalties provided by this section.

Subsection 20. Abatement of Taxes.—If the tax shown on the return filed by any person pursuant to this section is believed to be excessive or illegal, such person may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within three years from the last day for filing such return, determined without regard to any extension of time. Any person aggrieved by the assessment of any tax imposed by this section may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within two years after the date upon which the notice of assessment is sent. The commission shall, if requested, give the applicant a hearing upon his application; and if the commission finds that the tax is excessive in amount or illegal, the commission shall abate the tax in whole or in part accordingly.

If an abatement is granted and the tax has been paid, the state treasurer, upon certification of the commission, shall repay to the person who paid the tax the amount of such abatement, with interest thereon at the rate of six per cent per annum from the time when it was paid; provided, that if such person is a vendor who has collected reimbursement of such tax, no actual refund of money shall be made to such vendor until he shall first establish to the satisfaction of the commission, under such regulations as it may prescribe, that the vendor has repaid to the purchaser the amount for which the application for refund is made. In lieu of any refund required to be made, a credit may be allowed therefor on payment due from the applicant. The commission shall give notice to the applicant of its decision upon any application for abatement under this subsection.

Subsection 21. Limitation of Abatements.—No tax assessed on any person liable to taxation under this section

shall be abated in any event unless the person assessed shall have filed, at or before the time of bringing his application for abatement, a return as required by subsection nine for the period to which his application relates; and if he failed without good cause to file his return within the time prescribed by law, or filed a fraudulent return, or having filed an incorrect or insufficient return, has failed, after notice, to file a proper return, the commission shall not abate the tax below double the amount for which the person assessed was properly taxable under this section.

Subsection 22. Appeal to Appellate Tax Board.—Any person aggrieved by the refusal of the commission to abate, in whole or in part, under subsection twenty a tax assessed or collected under this section, may appeal therefrom within ninety days after the date of the notice of the decision of the commission, or within six months after the time when the application for abatement is deemed to be denied, as provided by section six of chapter fifty-eight A of the General Laws, by filing a petition with the clerk of the appellate tax board. If, on hearing, said board finds that the person making the appeal was entitled to an abatement under subsection twenty from the tax assessed on him, it shall make such abatement as it sees fit. Findings of fact of the appellate tax board shall be final and conclusive, and shall be communicated in writing to the petitioner and the commission within five days thereafter. If a tax so abated has been paid, the state treasurer, upon presentation to him of the notice of the decision of the board, shall repay to the petitioner the amount of the abatement and interest at the rate of six per cent per annum from the date of payment or the due date of the return, whichever is later.

The remedies provided by this subsection and subsections twenty and twenty-one shall be exclusive.

PROHIBITION AND PENALTIES.

Subsection 23. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

. . . . . .

TAXATION OF THE STORAGE, USE OR OTHER CONSUMPTION OF TANGIBLE PERSONAL PROPERTY.

SECTION 2. A tax on the storage, use or other consumption of tangible personal property is imposed in accordance with the following subsections:

. . . . . .

IMPOSITION AND LIABILITY FOR TAX.

Subsection 2. Imposition and Rate of Tax.—Except as otherwise provided in this section an excise is hereby imposed upon the storage, use or other consumption in this commonwealth of tangible personal property purchased from any vendor for storage, use or other consumption within this commonwealth at the rate of three per cent of the sales price of the property.

Subsection 3. Liability of User.—Every person storing, using or otherwise consuming in this commonwealth tangible personal property purchased from a vendor shall be liable for the tax imposed by this section. His liability shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor en-

gaged in business in this commonwealth or from a vendor who is authorized by the commissioner, under such regulations as the commission may prescribe, to collect the tax and who is, for the purposes of this section, regarded as a vendor engaged in business in this commonwealth, given to the purchaser pursuant to subsection four of this section, shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

Subsection 4. Liability of Vendor.—Every vendor engaged in business in this commonwealth and making sales of tangible personal property for storage, use or other consumption in this commonwealth not exempted under this section, shall at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner. The tax required to be collected by the vendor shall constitute a debt owed by the vendor to this commonwealth. For the purpose of uniformity of tax collection by the vendor and for other purposes the provisions of subsections three, four and five of section one are hereby incorporated in and made applicable to this section.

EXEMPTIONS.

Subsection 5. Exemptions.—The tax imposed by this section shall not apply to the following:

(*a*) Sales upon which taxes are imposed under section one of this act.

(*b*) Sales exempt from the taxes imposed under section one of this act; . . .

. . . . . .

RETURNS AND PAYMENT OF TAX.

Subsection 9. Returns and Payment of Tax.—The provisions of subsections nine, ten, eleven and thirteen of section one of this act are hereby incorporated in and made applicable to this section. Every vendor who is required or expressly authorized to pay the tax imposed by this section shall file returns and pay the tax in accordance with the provisions of such subsections applicable to the filing of returns and the payment of the tax and as shall be prescribed by regulations of the commission.

Subsection 10. Monthly Returns—Content and Form—Payment of Tax by Purchaser.—(*a*) *Filing Returns.*—Every purchaser who is required to pay a tax under this section shall file a return with the commissioner within twenty days after the end of each calendar month. Such returns shall show the total sales prices of all tangible personal property purchased at retail sale upon which the tax imposed has not been paid by the purchaser to vendors, the amount of tax for which the purchaser is liable, and such other information as the commissioner deems necessary for the computation and collection of the tax. The commission may by regulation require returns under this subsection to be filed on a quarterly rather than a monthly basis.

(*b*) *Contents of Return.*—The return filed by a purchaser shall include the sales prices of all tangible personal property purchased as taxable retail sale during the calendar month or other period for which the return is filed and upon which the tax imposed has not been reimbursed by the purchaser to vendors.

(*c*) *Payment of Tax.*—At the time of filing his return as provided in this subsection the purchaser shall pay to the commissioner the amount of tax for which he is liable as shown by the return.

. . . . . .

ASSESSMENT, COLLECTION, ADMINISTRATION, ENFORCEMENT, ABATEMENTS AND APPEALS.

Subsection 11. The assessment and collection of the tax imposed by this section, the administration and enforcement thereof, the abatement of taxes imposed by this section, and the rights and procedure for appeals shall be governed by the provisions of subsections fifteen to twenty-two, inclusive, of section one of this act, which provisions are hereby incorporated in and made applicable to this section. For the purposes of this section said provisions shall be construed to apply to any purchaser who becomes liable to taxation under this section.

PROHIBITION AND PENALTIES.

Subsection 12. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

Subsection 13. Criminal Penalties.—Any vendor or purchaser who wilfully fails to file a return required by this section when due, or wilfully files an incorrect or insufficient return, or with intent to evade taxation, files no return or a false or fraudulent return or submits a false certificate, affidavit or other statement to the commissioner or the commission relating to the amount of tax for which he is liable, shall be punished by a fine of not less than one hundred nor more than ten thousand dollars, or by imprisonment for not more than one year, or both.

. . . . . .

STATUTE 1966, CHAPTER 483.

[Advance Copy, 1966 Acts and Resolves, Pages 453-454.]

SECTION 1. Subsection 3 of section 1 of chapter 14 of the acts of 1966 is hereby amended by adding the following paragraph:—

Notwithstanding the provisions of this subsection, the excise imposed by subsection two of this section or by subsection two of section two upon sales at retail, or upon the storage, use or other consumption of motor vehicles or trailers shall be paid by the purchaser to the registrar of motor vehicles in the manner prescribed by the commissioner. The vendor thereof shall not add the tax to the sales price and shall not collect the tax from the purchaser. The vendor thereof shall, however, furnish to the purchaser, the registrar and the commissioner a sworn statement of the sale upon a form prescribed by the commissioner, with the approval of the commission, giving such information as the commissioner may require for the determination of such tax.

SECTION 2. This act shall take effect on November first, nineteen hundred and sixty-six. *Approved August 8, 1966.*

Massachusetts Sales and Use Tax Emergency Regulations.

EMERGENCY REGULATION No. 6

National Banks—Federal Savings and Loan Associations

The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax.

National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales.

STATE TAX COMMISSION
Guy J. Rizzotto,—*Chairman*
Leo E. Diehl
Donald T. Wood

May 31, 1966

A true copy
Attest:

Neil P. Shea
Executive Assistant
Massachusetts State Tax Commission

NATIONAL BANK SHARES

§ 548. State taxation.

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and

business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223.)

Judgment—Rescript.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

July 27, 1967.

IN THE CASE OF
FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
vs.
STATE TAX COMMISSION

pending in the Supreme Judicial Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Interlocutory decree to be entered overruling the demurrer.

Final decree to be entered in accordance with the opinion.

BY THE COURT,
RICHARD A. MCLAUGHLIN,
Clerk

July 27, 1967

Final Decree.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT

No. 69316 Equity

FIRST AGRICULTURAL BANK OF BERKSHIRE COUNTY

v.

STATE TAX COMMISSION

FINAL DECREE

This cause came on to further heard upon the rescript and opinion of the full bench and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1: Emergency regulation No. 6, of the State Tax Commission is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes, St. 1966, c. 14, secs. 1 and 2.

By the Court, (Spiegel, J.)

JOHN E. POWERS,

Entered: August 9, 1967 Clerk